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JUN 10 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER, 1942, TERM.

No. 938.

LYMAN FLENIKEN AND MRS. LYMAN FLENIKEN, PETITIONERS,

VS.

GREAT AMERICAN INDEMNITY COMPANY, A CORPORATION, CAPITAL CITY PRESS, A CORPORATION, WM. WOLF BAKERY, INC., A CORPORATION, AND HARRY V. BOOTH, RECEIVER OF UNITED EMPLOYERS CASUALTY COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR REHEARING OF PETITIONERS.

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PETITION FOR REHEARING OF PETITIONERS.

Come now the above named petitioners, Lyman Fleniken and Mrs. Lyman Fleniken, and present this their petition for rehearing of the petition for certiorari in this case.

I.

Jurisdiction.

The petition for certiorari was filed 16th day of April, 1943, and was denied on the 17th day of May, 1943. This

petition is filed within twenty five days thereafter under Rule 33 of this Court.

II.

Reasons for Petition for Rehearing.

On study it is found that neither the petition for certiorari nor the brief clearly points out that the Court of Appeals below was in error on the principal point involved in applying the American Law Institute's Restatement of the Law of Agency to reach a result contrary to the jurisprudence of Louisiana as exemplified by the Louisiana Revised Civil Code, Articles 2317 and 2320 and as exemplified by the applicable Louisiana decisions, namely, *Ragas* v. *Douglas*, (La. Sup., 1916) 139 La. 773, *Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183, and *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351, reversed on rehearing 191 So. 713, cert. granted by La. S. Ct. (Appendix to petition page 25), cert. vacated by stipulation of compromise (Appendix to petition page 26).

The error lay in applying the American Law Institute's Restatement of the Law of Agency, Sections 2 and 250 and foreign cases and in ignoring the fact that the Louisiana jurisprudence is contrary to the conclusion arrived at on the basis of the Restatement and foreign case law cited by the Court of Appeals in support of its conclusion.

III.

The Controlling Question.

The controlling question therefore is: Did the Court below by employing the *dictum* of the Restatement of the Law of Agency and the authority of foreign jurisdictions reach a different result than would have been reached by the Courts of Louisiana applying Louisiana jurisprudence?

A subsidiary question is whether Petitioners or Respondent has correctly stated the facts. In its brief, Re-

spondent challenged certain statements of fact made by Petitioners (Respondents' Brief page 1), and set out twenty one separate statements of fact in its argument (Respondents' Brief pages 9-11). We wish to point out here that the jury found against the Respondent Great American Indemnity Company on the issues of fact which it claims to have been established in its favor. On this appeal it is elementary that the facts must be viewed in the light most favorable to your Petitioners. So viewing the facts, Respondents' statement of the case is incorrect and the exceptions to your Petitioners' statement are not well taken. The Respondent attempted to state the facts in the light most favorable to it, which is not permissible.

IV.

The Court of Appeals Erred.

On the controlling question, the affirmative holding of the Circuit Court of Appeals is in direct conflict with the applicable local jurisprudence.

1. The American Law Institute's Restatement of the Law of Agency (whether correctly interpreted by the Court below or not) does not supersede the jurisprudence of Louisiana.

2. The Court below reached a different result than would have been reached by the Courts of Louisiana applying Louisiana jurisprudence. The Court below construed Articles 2317 and 2320 of the Louisiana Revised Civil Code, directly contrary to the jurisprudence of Louisiana as exemplified in the controlling decision of *Ragas* v. *Douglas*, (1916) 139 La. 773, 72 So. 242. The Court below held that these sections contained a limitation on the responsibility of masters. The Supreme Court of Louisiana in the Ragas case held expressly that the Court "does not operate to effect" the limitation relied on by the Court below.

In denying certiorari this Court has upheld a decision of the Court below construing a provision of the Louisiana Civil Code directly contrary to the construction placed upon it by the highest Court in Louisiana.

3. If this case had been decided by the Courts of Louisiana, the judgment in favor of your Petitioners would have been affirmed. *Ravare* v. *McCormick & Co.*, (La. App., 1936) 166 So. 183; *Gallaher* v. *Ricketts*, (La. App., 1939) 187 So. 351, reversed on rehearing (La. App., 1939) 191 So. 713, cert. granted by Louisiana Supreme Court. These last controlling cases of Louisiana Courts were brushed aside in favor of the Restatement and foreign cases.

V.

Public Importance.

The granting of the petition for certiorari in this case is a matter of great public importance. The Circuit Court of Appeals below determined an important question of Louisiana law in a manner which conflicts with the applicable Louisiana jurisprudence contained in the Louisiana Revised Civil Code and decisions of the Louisiana courts applying the Code. The only authority to sustain the Circuit Court of Appeals is the American Law Institute's Restatement of the Law of Agency (if the Court of Appeals is correct, which we deny) and cases from foreign jurisdictions. The Respondents defended the correct construction of the Louisiana Code with a citation from the Restatement (Respondents' Brief pages 2 and 3). There will be many cases involving the doctrine of *respondeat superior* and the application of Articles 2317 and 2320 of the Louisiana Revised Civil Code tried in the federal courts of Louisiana. If the decision in the case at bar is permitted to stand and the federal courts follow that decision, as they well may, contrary results will be reached in like cases depending upon the fortuitous circumstances of federal jurisdictions. This is a grave

question and one that should not be permitted to pass in review by this Court.

Conclusion.

For the foregoing reasons, Petitioners respectfully urge that a rehearing be granted; that upon further consideration the order of May 17, 1943, denying the petition for certiorari will be revoked; and that the writ of certiorari issue.

William H. Becker

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Of Counsel for Petitioners.

Certificate.

I, William H. Becker, Counsel for Petitioners herein, do hereby certify that the foregoing petition for rehearing is presented in this cause in good faith and not for delay.

William H. Becker

WILLIAM H. BECKER,
Attorney for Petitioners.